Supreme Court, U.S.
FILED
JUL 18 1991
OFFICE OF THE CLERK

(3)

No. 90-1947

In The

Supreme Court of the United States

October Term, 1990

JOHN K. YEE, et al.,

Petitioners,

v.

THE CITY OF ESCONDIDO,

Respondent.

Petition for Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS JOHN K. YEE, ET AL.

RONALD A. ZUMBRUN
*ANTHONY T. CASO
*Counsel of Record
R. S. RADFORD
Of Counsel
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae, Pacific Legal Foundation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED..... ii

INTEREST OF AMICUS 1

STATEMENT OF THE CASE..... 3

SUMMARY OF ARGUMENT..... 4

ARGUMENT 5

THE DECISION BELOW, IF ALLOWED TO STAND, WILL RESULT IN A TAKING OF PETITIONERS' PROPERTY WITHOUT JUST COMPENSATION .. 5

CONCLUSION 12

TABLE OF AUTHORITIES CITED

Page

CASES

Armstrong v. United States, 364 U.S. 40 (1960) 7

Federal Communications Commission v. Florida Power Corp., 480 U.S. 245 (1987) 9

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 2

Hall v. City of Santa Barbara, 797 F.2d 1493 (9th Cir. 1986) 5, 6, 8, 9, 10, 11

Hodel v. Irving, 481 U.S. 704 (1987) 2, 5, 8

Kaiser Aetna v. United States, 444 U.S. 164 (1979) . 5, 7, 8

Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987) 2

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 7

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 2, 5, 8, 9

Pinewood Estates of Michigan v. Barnegat Township Leveling Board, 898 F.2d 347 (3d Cir. 1990) 5, 6, 10

Rohr Aircraft Corp. v. County of San Diego, 51 Cal. 2d 759 (1959) 6

United States v. Causby, 328 U.S. 256 (1946) 7

United States v. General Motors Corp., 323 U.S. 373 (1945) 7

United States v. Virginia Electric and Power Co., 365 U.S. 624 (1961) 7

TABLE OF AUTHORITIES CITED—Continued

Page

STATUTES

Cal. Civ. Code § 798, et seq. 3

RULES

Supreme Court Rule 10(b) 6

Rule 37 1

UNITED STATES CONSTITUTION

Article VI, clause 2 7

MISCELLANEOUS

Hirsch and Hirsch, Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol, 35 UCLA L. Rev. 399 (1988) 5, 10

No. 90-1947

In The

Supreme Court of the United States

October Term, 1990

JOHN K. YEE, et al.,

Petitioners,

v.

THE CITY OF ESCONDIDO,

Respondent.

Petition for Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS JOHN K. YEE, ET AL.

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petition for writ of certiorari. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the clerk of this Court.

INTEREST OF AMICUS

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of

California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Its attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

The present case involves an egregious violation of federal constitutional rights in the guise of local land use regulation. The opinion below upholds a mobile home rent control scheme that effectively transfers a fee interest from the owners of mobile home parks to the owners of

mobile home coaches situated in those parks. This regulatory wealth transfer is substantially identical to schemes struck down by two federal Circuit Courts as violating the Takings Clause. The ordinance also violates this Court's tests for regulatory takings by failing to substantially advance legitimate governmental interests and by depriving park owners of economically viable use of their property.

This amicus believes the opinion below places California state courts in direct conflict with federal case law on a question of federal constitutional rights. Moreover, the opinion below conflicts with this Court's decision in *Nollan* and other regulatory takings cases. If allowed to stand, the opinion below will constitute a serious setback for individual rights by undermining the constitutional prohibition against taking private property without just compensation.

STATEMENT OF THE CASE

Petitioners, owners of mobile home parks in the City of Escondido, brought an action in state court challenging, as a taking without compensation, the city's mobile home rent control ordinance. The ordinance, in concert with the state Mobilehome Residency Law (Cal. Civ. Code § 798, *et seq.*), gives well-behaved tenants a perpetual right to occupy their mobile home pads at below market rents. Someone buying a mobile home coach from a tenant in an Escondido park will acquire that same right.

Petitioners allege that the price of used mobile homes in Escondido has increased dramatically since passage of

the rent control ordinance. They allege that this increase is due entirely to the fact that existing tenants are able to monetize the value of perpetual occupancy of the owners' property at controlled rents. *Yee v. City of Escondido*, 224 Cal. App. 3d 1349, 1352 (1990). Rather than let petitioners prove these allegations at trial, the trial court sustained the city's demurrer, without leave to amend, and dismissed the action. The California Court of Appeal affirmed, ruling that the complaint did not state a cause of action for an uncompensated taking under the Fifth Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

In holding that petitioners have not stated a claim under the Takings Clause, the court below expressly rejects the contrary rulings of two federal Circuit Courts. *Yee v. City of Escondido*, 224 Cal. App. 3d at 1354-59. This creates a direct conflict between the federal courts and California state courts on a question of federal constitutional law.

Moreover, the holding below rejects the clear teaching of this Court. The regulation at issue in this case confiscates a marketable interest in real property from the owners of mobile home parks and transfers it to the owners of certain mobile homes. The relevant property interest—in effect, a servitude—is well within the mainstream of those recognized by this Court as qualifying for protection under the Takings Clause.

The servitude taken by the Escondido ordinance is a valuable commodity that is routinely bought and sold in

the open market. The fair market value of the servitude is measured by the resale premium commanded by mobile home coaches located in petitioners' mobile home parks, compared with identical coaches located on unregulated sites. *See* Hirsch and Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399 (1988).

The Escondido ordinance simply seizes this valuable commodity from petitioners and transfers it, without compensation, to third parties.

This Court has repeatedly held that regulations which confiscate a discrete, marketable property interest without compensation violate the Takings Clause of the Fifth Amendment. *E.g., Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Hodel v. Irving*, 481 U.S. 704; *Nollan v. California Coastal Commission*, 483 U.S. 825. By any consistent application of this Court's precedent, the same conclusion must apply to the Escondido ordinance at issue in this case.

ARGUMENT

THE DECISION BELOW, IF ALLOWED TO STAND, WILL RESULT IN A TAKING OF PETITIONERS' PROPERTY WITHOUT JUST COMPENSATION

The Court of Appeal readily admitted that two federal Circuit Courts (the Ninth Circuit in *Hall v. City of Santa Barbara*, 797 F.2d 1493 (9th Cir. 1986) and the Third Circuit in *Pinewood Estates of Michigan v. Barnegat Township Leveling Board*, 898 F.2d 347 (3d Cir. 1990)) would hold that these allegations *do* state a claim for a taking.

Yee v. City of Escondido, 224 Cal. App. 3d at 1354-59. But the Court of Appeal, noting that lower federal court decisions are not binding upon the state courts even on questions of federal law (*Rohr Aircraft Corp. v. County of San Diego*, 51 Cal. 2d 759, 764 (1959)), rejected the reasoning of the federal courts. *Yee*, 224 Cal. App. 3d at 1358-59 n.12. Thus a direct conflict now exists between the federal courts and the California state courts. Supreme Court Rule 10(b).

The federal courts in *Hall* and *Pinewood Estates* found that, when buyers are willing to pay a premium for a mobile home coach located on a rent-controlled pad, they are purchasing more than just the coach. Rather, they are acquiring a property interest—a type of servitude—in the site itself. The servitude entitles a coach owner to perpetually occupy the property of another without paying fair market rent.

This servitude represents a freely marketable interest in the real property of the park owner. The regulations at issue transfer this property interest to the owners of mobile home coaches occupying sites in the park. The federal courts concluded that this transfer of a freely marketable property interest comprises a *per se* taking, requiring just compensation under the Takings Clause.

The California Court of Appeal in *Yee* disagreed with this view. According to the Court of Appeal, "[t]he critical question is whether such a transfer can be justified by a rational governmental purpose," and whether the controlled rents are "fair and reasonable." *Yee*, 224 Cal. App. 3d at 1354.

This rejection of the per se rule is more than just a rejection of the reasoning of two federal courts, as claimed by the Court of Appeal. It is instead the rejection of a substantial body of United States Supreme Court precedent which is binding on state courts under the Supremacy Clause. U.S. Const. Art. VI, cl. 2.

There can be no doubt that the servitude transferred to the owners of mobile home coaches is a protected property interest under the Fifth Amendment. This Court has defined the interests subject to constitutional protection as all those rights inhering in an individual's relation to the thing owned, including the rights of possession, use, and disposal. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Protected property interests include not just fee interests and leaseholds, but "every sort of interest the citizen may possess." *Id.* Specific property interests that have been recognized by this Court under the Takings Clause have included the use of air space, *United States v. Causby*, 328 U.S. 256 (1946); flowage easements, *United States v. Virginia Electric and Power Co.*, 365 U.S. 624 (1961); liens, *Armstrong v. United States*, 364 U.S. 40 (1960); the right to exclude third parties, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); and the right to exclude the general public, *Kaiser Aetna v. United States*, 444 U.S. 164. The freely marketable servitude confiscated by the Escondido ordinance falls well within the mainstream of property interests qualifying for constitutional protection.

In the absence of the regulations at issue, mobile home coach owners could have purchased a servitude from park owners guaranteeing them a perpetual coach site at below-market rents. The fair market value of the

servitude would have been determined through negotiation, and the park owner would have received this amount in exchange for his property interest. The Escondido ordinance in the case at bar, like the Santa Barbara ordinance in *Hall*, simply confiscates this servitude and transfers it to coach owners, without compensating petitioners for the loss of their property.

Similar issues have come before this Court. In *Kaiser Aetna v. United States*, 444 U.S. 164, for example, the federal government sued the owner of a pond which had been connected to the ocean by the owner's construction of a channel. The government sought a declaration that, by connecting the pond to the navigable waters of the United States, the public had obtained a servitude giving them "a right of access to what was once petitioners' private pond." *Id.* at 166. This Court held that the government's attempt to seize such a servitude "goes so far beyond ordinary regulation . . . as to amount to a taking." *Id.* at 178.

Again, in *Hodel v. Irving*, 481 U.S. 704, Congress attempted to transfer small common tenancy interests in land from the Indians who owned them to the tribe. *Id.* at 708-09. Likening the case to the attempted seizure of a servitude in *Kaiser Aetna*, this Court ruled that transferring even these small fractionalized interests amounted to an unconstitutional taking.

In *Nollan v. California Coastal Commission*, 483 U.S. 825, a state agency required a property owner to convey an easement as a condition to the issuance of a building permit. This Court first considered whether such a conveyance could be demanded by simple legislative fiat—

such as the Escondido ordinance in the case at bar. On that question, the *Nollan* Court held:

> "Had California simply required the Nollans to make an easement across their beachfront available to the public . . . rather than conditioning their permit . . . we have no doubt there would have been a taking." *Id.* at 831.

It should be noted that the property owners in *Nollan* already freely permitted people to traverse their beach. *Id.* at 858 (Brennan, J., dissenting). Nevertheless, the demand that they forfeit a property interest giving the public a formal right of occupancy was held to violate the Takings Clause. The same was true of *Hall* and, by any consistent application of precedent, the same is true of the case at bar. The Court of Appeal's observation that owners of mobile home parks are not forced to involuntarily accept the occupation of their property by third persons (*Yee*, 224 Cal. App. 3d at 1358) does nothing to distinguish these cases from the relevant line of Supreme Court precedent.

The court below hoped by that observation to portray *Hall* and its progeny as inconsistent with *Federal Communications Commission v. Florida Power Corp.*, 480 U.S. 245 (1987). It should first be noted that *Florida Power* did not change the rule regarding per se takings. Both *Hodel v. Irving* and *Nollan* were decided after *Florida Power*. Further, *Florida Power* did not involve the outright confiscation and transfer of a property interest. If the cable companies who were the beneficiaries of regulation in *Florida Power* decided to remove their cables from petitioner's utility poles, they retained no rights in the poles to sell to other cable companies. In the instant case, the

City of Escondido slices away petitioners' property and gives it to others who can freely market it. This clearly goes far beyond mere regulation.

In contrast to the federal courts in *Hall* and *Pinewood Estates*, the court below failed to comprehend that the premium paid for coaches in rent-controlled parks represents the value of an interest in the park owner's property. The Court of Appeal asserts that this premium is paid for the coach itself, contending that coaches and pads are complementary goods like popcorn and popcorn poppers. *Yee*, 224 Cal. App. 3d at 1352-53.

As pointed out in the dissent, this reasoning illustrates the dangers of judges relying on their own lay opinions rather than allowing factual questions to go to trial. If there had been a trial, with real economists providing expert testimony (*see, e.g.*, Hirsch and Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399), the Court of Appeal might have learned that if mobile home pads and coaches were truly complementary goods, the price of new coaches would rise in the showroom when rent control is enacted. But this does not happen. Only those coaches already situated on pads in regulated mobile home parks command such a premium. The selling price of these mobile homes increases because they carry with them the value of the servitude confiscated by Escondido's regulation. Identical coaches outside rent controlled parks command no premium because their value does not include a servitude confiscated from park owners.

The facts alleged by petitioners show that an actual transfer of a property interest has occurred, an interest which coach owners can freely sell on the open market. The Court of Appeal's rejection of the per se taking rule, and its substitution of reasoning expressly rejected by the federal courts, is far more than a disagreement with two United States Circuit Courts of Appeals. It is a rejection of this Court's well-established precedent.

While there are times when California may be justified in departing from federal precedent in order to afford its citizens more constitutional protection than the federal courts have provided, that is not the case here. Here the California Court of Appeal is depriving California citizens of property rights recognized by the federal courts.

"The right to occupy property in perpetuity is surely the type of interest that is protected by the taking clause." *Hall*, 797 F.2d at 1498 (footnote omitted). By the plain language of the Fifth Amendment, the Escondido ordinance must be struck down as an unconstitutional taking without just compensation.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for writ of certiorari should be granted.

DATED: July, 1991.

Respectfully submitted,

RONALD A. ZUMBRUN
*ANTHONY T. CASO
*Counsel of Record
R. S. RADFORD
Of Counsel
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae,
Pacific Legal Foundation